

HAMILTON BROTHERS OIL CO.

IBLA 88-550

Decided June 8, 1992

Appeal from a decision of the Director, Minerals Management Service, granting in part and denying in part appellant's request for a refund of royalty overpayments on Outer Continental Shelf leases. MMS-87-0174-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Refunds

Sec. 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1988), authorizes the issuance of refunds for royalty overpayments only where the request for a refund is made within 2 years of the date that the overpayment is received.

APPEARANCES: John C. Letteri, Esq., Houston, Texas, for appellant; Howard W. Chalker, Esq., Douglas O. Bowman, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Hamilton Brothers Oil Company appeals from that part of an April 19, 1988, decision of the Director, Minerals Management Service (MMS), denying its request for refund of overpayments of royalties made prior to November 9, 1981, for Federal offshore oil and gas lease Nos. 054-002310, 054-002311, and 054-002600. The royalty payments were made for natural gas produced from the leases which were issued pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (1988).

On September 19, 1986, appellant filed a request for refund of overpayments of royalties in the amount of \$88,056.04, for natural gas produced from the leases between November 1979 and June 1983. The refund request followed protracted litigation over the method set by the Federal Energy Regulatory Commission (FERC) in FERC order Nos. 93 and 93-A for measuring the energy content of natural gas for the purpose of establishing its first-sale ceiling price. This regulated price is one of the factors considered by MMS in determining the value of production upon which computation of royalties is based.

Effective December 1, 1978, FERC required the energy content of the gas to be measured in a manner to reflect the actual condition of the gas when delivered ("dry" rule). The ensuing litigation culminated in a decision vacating FERC's orders and requiring natural gas producers to measure

the energy content of the gas under certain standard conditions, i.e., saturated with water vapor ("wet" rule). As a result, the measured energy content of the gas was reduced and, hence, the maximum sales price of the gas was reduced. Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 716 F.2d 1 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984) (INGAA I). An indirect effect of this ruling was that natural gas producers had been paying royalties based on a valuation of the gas which was too high.

On March 11, 1987, the Lakewood Regional Compliance Office of MMS denied appellant's refund request to the extent it included \$81,909.11, paid in the period from November 1979 through March 5, 1983, finding that the payments were made more than 2 years prior to the request for refund and hence a refund was precluded by section 10 of OCSLA, 43 U.S.C. § 1339 (1988). 1/ This denial was appealed to the Director, MMS. Appellant argued that the claim should not be barred because it filed its request in a timely fashion after its right to a refund had been established.

In his April 19, 1988, decision, the Director, MMS, followed the Board's decision in Shell Offshore Inc., 96 IBLA 149, 94 I.D. 69 (1987), 2/ which held that the 2-year period for requesting refunds begins with the date the payment is made and not the date the producer becomes aware a refund is due. Noting that the Board had construed MMS' November 9, 1983, letter to gas producers as an acknowledgement that all producers would request refunds for overpayments made as a result of the vacated FERC orders, the Director reversed that part of the Regional Compliance Office's decision which denied appellant refunds for payments made on or after November 9, 1981. Therefore, MMS concluded that appellant was entitled to all properly documented royalty overpayments made on or after November 9, 1981, but denied any refund for payments made before that date.

Appellant contends on appeal that it made its request for refund of royalty overpayments in a timely fashion. It states that it diligently submitted its request within a short time after its right to a refund was finally determined. 3/ Appellant argues that the statutory 2-year

1/ The 2-year period was extended by the interval from Nov. 9, 1983, to May 5, 1985, during which the time limit was held to have been tolled.

2/ Rev'd sub nom. Chevron U.S.A., Inc. v. United States, 17 Cl. Ct. 537, rev'd, 923 F.2d 830 (Fed. Cir. 1991), cert. denied sub nom. Phillips Petroleum Co. v. United States, ___ U.S. ___, 112 S. Ct. 167 (1991). Consideration of the present appeal was previously stayed by the Board pending final resolution of judicial review of the Shell Offshore decision. In light of the conclusion of judicial review, counsel for MMS filed a motion on Apr. 1, 1992, requesting that the Board issue a decision in this case based on the results of that litigation. Appellant has not responded further at this point. Accordingly, the suspension of review by the Board is hereby terminated and we consider this appeal on the merits.

3/ Although appellant claims that its right to a refund was not clearly indicated until the second decision in Interstate Natural Gas Association

limitation from the time of royalty payment for applying for a refund should be subject to equitable tolling for the entire period that the issue of the proper valuation of the natural gas was under litigation, *i.e.*, from December 1, 1978, when FERC order 93 retroactively took effect, until July 18, 1985, when FERC adopted an order implementing the court's decision concerning offsets in INGAA II, *supra*.

Appellant asserts that tolling of the statute of limitations is both consistent with the congressional intent of the OCSLA limitation to preclude a lessee from presenting a stale claim and necessary to vindicate appellant's right to a refund. Appellant argues that Congress did not intend to bar the claims of a lessee who submitted a refund request as soon as the right to a refund was established even if that was more than 2 years after the payment was made. Appellant attempts to distinguish Shell Offshore, Inc., *supra*, contending that decision did not consider the issue of equitable tolling of the statute of limitations.

In its answer, MMS argues that equitable tolling is not appropriate here because Congress established an explicit starting point for the running of the limitation period, *i.e.*, when the payment is made, which indicates that equitable tolling would not be consistent with congressional intent. Furthermore, MMS contends that this case is clearly controlled by the Board's decision in Shell Offshore, Inc., *supra*. MMS notes that the Board addressed the issue of equitable tolling in all but name only when it decided precisely the same issue in that case as presented here.

[1] The relevant statutory provision, section 10 of OCSLA, provides in pertinent part:

[W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after making of the payment
* * *.

43 U.S.C. § 1339(a) (1988). In Shell Offshore, Inc., *supra*, we found that:

The statute conditions the authority of the Secretary to make repayment upon a request being filed "within two years after

fn. 3 (continued)

of America v. Federal Energy Regulatory Commission, 756 F.2d 166 (D.C. Cir. 1985), *cert. denied sub nom. Pennzoil Co. v. Associated Gas Distributors*, 474 U.S. 847 (1985) (INGAA II), that decision dealt with a controversy concerning offsets which was wholly separate from the issue of the proper valuation of gas decided in the earlier decision. *Id.* at 171. Thus, appellant's right to a refund was settled no later than Mar. 19, 1984, the date the Supreme Court denied certiorari in the earlier case. We note that appellant filed its refund request more than 2 years after that date.

the making of the payment." A payment is made when it is tendered to the appropriate agency. William E. Phalen, 85 IBLA 151 (1985); Mobil Oil Corp., 35 IBLA 265 (1978). There is no ambiguity in the wording of the statute; the terms of the Act cannot be varied simply because the appellants may for other reasons appear to deserve refunds. See 2A Sutherland, Statutes and Statutory Construction § 46.01 (4th ed., rev. 1984).

96 IBLA at 165, 94 I.D. at 78.

We must agree with MMS. Appellant argues that the 2-year limit on requesting refunds is a statute of limitations subject to equitable tolling and, hence, it did not begin to run until the right to a refund became clear after the court decision on FERC's valuation methods. In Shell Offshore, Inc., *supra*, the Board found that the 2-year limitation constitutes a limit on the grant of administrative authority and, thus, it was necessary to reject appellants' argument that the period did not begin to run until they knew a refund was due. 96 IBLA at 166, 94 I.D. at 79. On judicial review, the Federal Circuit confirmed that the statute requires a request for refund within 2 years of the original royalty payment in order to establish a timely request for a refund. 923 F.2d at 833. Similarly, the court found it was error to measure the 2-year period from issuance of the INGAA decision invalidating the FERC rule. *Id.* at 834. Because the result in this case is mandated by the Board's decision in Shell Offshore, Inc., and we find MMS properly applied that decision in adjudicating appellant's refund request, we uphold MMS' determination.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

